

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS M. SHOAFF,

Plaintiff-Appellee,

v

ESTATE OF DUANE BALDWIN, DUANE V.
BALDWIN TRUST and THOMAS E. WOODS,
as Personal Representative of the Estate of Duane
Baldwin and as Trustee of the Duane V. Baldwin
Trust,

Defendants-Appellants,

and

GARY D. BALDWIN, as Former Personal
Representative of the Estate of Duane Baldwin,
MARY JO BALDWIN, as Former Trustee of the
Duane V. Baldwin Trust, JACOBS
MANAGEMENT, LLC, FFM CO, INC., DGM
CORPORATION, AGRICON, LLC,
STOCKBRIDGE LIMITED PARTNERSHIP #1,
STOCKBRIDGE LIMITED PARTNERSHIP #2,
STOCKBRIDGE LIMITED PARTNERSHIP #3,
STOCKBRIDGE PARTNERSHIP #4 and
STOCKBRIDGE LIMITED PARTNERSHIP #5,

Defendants/Cross-
Plaintiffs/Counterplaintiffs.

UNPUBLISHED

July 1, 2008

No. 270693

Ingham Circuit Court

LC No. 99-090282-CZ

Before: Donofrio, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendants appeal from orders of the circuit court awarding plaintiff title and possession of certain property pursuant to the execution of judgment, along with an award of costs and attorney fees associated with the execution of that judgment. We reverse.

This appeal concerns post-judgment proceedings. Plaintiff had obtained a judgment, awarding him in excess of \$1.3 million, including prejudgment interest, arising out of a business transaction with decedent in the 1990s. The transaction involved a sod farm in Florida. Plaintiff's participation was to provide guarantees for bank loans, eventually totaling \$700,000, to the business venture. Decedent had agreed to indemnify and hold plaintiff harmless in the event of the failure of the venture to meet its obligations, resulting in plaintiff having to repay the loans under the guarantee. Decedent had represented sufficient assets to cover the obligations. Unknown to plaintiff at the time, decedent had five years previously transferred the bulk of his assets to the various defendant companies (referred to below and in this opinion as the "entity defendants"), isolating those assets from his creditors.

The sod farm failed in 1998 without making any payments on the loans, and within a few months, decedent died suddenly from a heart attack. Decedent's estate was worth less than \$15,000. Pursuant to the guarantee, plaintiff paid the loans. Thereafter, plaintiff petitioned for the estate to be reopened and he pursued an action based upon the indemnity agreement, as well as other claims. Plaintiff was to obtain a consent judgment against the estate and trust and, following a trial in circuit court, was able to have the various property transfers from decedent to the entity defendants set aside under the Uniform Fraudulent Conveyances Act, MCL 566.11 *et seq.* Defendants appealed and this Court affirmed in an unpublished opinion per curiam. *Shoaff v Estate of Duane V Baldwin* (Docket Nos. 248606, 248609, and 255460, issued February 3, 2005).

In April 2006, the circuit court entered an order transferring title to the property to plaintiff to satisfy the judgment. The order provided the property was to be valued at \$1.8 million, plaintiff was to pay any liens on the property that had a higher priority than plaintiff's judgment and, if the equity in the property after payment of the superior liens exceeded the amount of plaintiff's judgment, plaintiff was to file a satisfaction of judgment with the court and pay into the probate court the difference between the remaining equity and the amount necessary to satisfy plaintiff's judgment to be administered as part of the Baldwin estate.

The post-judgment proceedings have resulted in three separate appeals that were submitted to this panel, with this appeal being the primary one. We will begin our analysis by considering what is certainly the most significant issue in this case: whether the plaintiff could execute on his judgment against the property in circuit court or whether plaintiff had to pursue his claim in probate court as a creditor of the estate. This issue is significant because it appears that the obligations of the estate exceed the value of the property and that plaintiff's claim may be subordinate to other claims that have a greater priority for payment under the Estates and Protected Individuals Code (EPIC). MCL 700.1101 *et seq.* Defendants argue on appeal that, once the circuit court set aside the conveyances to the entity defendants, title reverted to decedent and, therefore, became assets of the estate to be administered pursuant to EPIC. We agree and reverse the circuit court.

Whether plaintiff could execute directly on the property to enforce his judgment under MCL 600.6104 or whether the property became an asset of the estate and had to be administered under EPIC presents a question of statutory construction which we review de novo. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003). MCL 700.3812 restricts the execution under a judgment on estate property:

An execution shall not issue upon nor shall a levy be made against estate property under a judgment against a decedent or personal representative. This section shall not be construed to present the enforcement of a mortgage, pledge, or lien upon property in an appropriate proceeding.

Thus, the question becomes whether this property was estate property. We agree with defendants that it was.

The original judgment in this matter set aside the conveyances from the decedent to the entity defendants:

IT IS FURTHER ORDERED AND ADJUDGED that all transfers of property, real, personal or mixed, to the Entity Defendants are hereby set aside to the extent necessary to satisfy Plaintiff's claim under this Judgment and Plaintiff's Partial Consent Judgment against Defendants [sic] Estate of Duane V. Baldwin and the Defendant Duane V. Baldwin Trust. Attached to this Judgment as Exhibit "A" is a list of real property, the transfers of which, are hereby set aside for the benefit of Plaintiff to satisfy his Judgment against defendants together with interest, costs and attorney fees.

That judgment was affirmed by this Court, *Shoaff, slip op* at 18, which also noted that the property reverted to decedent:

Pursuant to the final judgment, plaintiff may now execute against the property held by the entity defendants, deemed alter egos of Duane Baldwin, to the extent necessary to satisfy his claim. Any recorded liens or taxes will have to be satisfied first according to law and, then, to the extent that any of the property, i.e., sham entity, is liable for any debts of the debtor, such property shall be included in his [decedent's] assets and is not exempt from liability for his debts.

In our view, the conclusion is inescapable: if the conveyances are set aside (which they were), then the property reverts to previous state: ownership by Duane V. Baldwin. Because he is deceased, the property becomes an asset of his estate. The property, as well as the debt owed plaintiff under the judgment, must be administered as part of the estate in accordance with the provisions of EPIC, including the provision of MCL 700.3812 precluding execution against the property.

Indeed, we note with interest that plaintiff himself recognized that this property was an asset of the estate and that the estate had to liquidate the asset and pay plaintiff's claim at a proceeding in the probate court. On February 16, 2005, two weeks after the issuance of this Court's opinion in this matter, a hearing was held in the probate court on plaintiff's petition to remove defendant Woods as the personal representative for failure to marshal the assets after the circuit court had set aside the conveyances and to pay plaintiff's claim. The following exchanges occurred between plaintiff's attorneys and the probate judge:

MR. ZACK: Circuit Court issued a judgment setting aside the conveyances. We asked Mr. Woods to then take charge of the real estate as personal representative of the estate as called for in the Probate Court.

* * *

THE COURT: Right. So as I understand it, you have a Circuit Court judgment against the estate?

MR. ZACK: Correct.

THE COURT: And you've taken no steps to collect on that judgment, true?

MR. ZACK: We are precluded from executing on the real estate.

THE COURT: How?

MR. ZACK: By the Probate Code, Your Honor. There is a ----

THE COURT: You have a Circuit Court judgment against an estate. Now, there's no stay on appeal. So you could engage in whatever collection proceedings in Circuit Court you'd like.

MR. ZACK: There is a section of the Probate Court ---

THE COURT: Code?

MR. ZACK: Probate Code, that states that you cannot execute against estate assets.

THE COURT: Give me the cite.

MR. ZACK: Your Honor, it's 700.3812.

THE COURT: One moment. Is the real property an asset of the estate or the trust?

MR. ZACK: It is an asset of the estate.

* * *

THE COURT: So as I understand it, your objection to Mr. Woods boils down to the fact that there is property out there that belongs to the estate that the estate has not taken possession of, so to speak.

MR. ZACK: Correct.

THE COURT: Which would allow, apparently, the real estate to be then poured into the trust, which would allow you to execute against it.

MR. ZACK: Or, if it were in the estate, it would allow the personal representative to sell the real estate so that it could be used to pay the judgment credit.

THE COURT: Is that it?

MR. ZACK: Yes.

* * *

MR. ZACK: Okay. When the decedent died, if you looked at the record title to the real estate, the real estate was in the name of these limited partnerships.

THE COURT: Okay.

MR. ZACK: Judge Houk's second judgment set aside the conveyances to those entities.

THE COURT: From the decedent to the LLP's [sic].

MR. ZACK: Correct, which we interpreted as meaning those conveyances were a nullity.

THE COURT: And he did that after the decedent died?

MR. ZACK: Yes.

THE COURT: So how is it that Judge Houk had jurisdiction to decide anything regarding what was in or outside of the estate?

MR. ZACK: He didn't decide what was in or outside of the estate. He decided whether or not the decedent had made fraudulent conveyances –

* * *

THE COURT: Well, what does that mean?

MR. ZACK: That means that the title to the real estate then reverted back to the decedent; therefore, it became part of his estate.

* * *

THE COURT: What is it that Mr. Woods was supposed to do that he didn't do?

MR. ZACK: Take possession of the real estate, inventory it as a probate asset, begin to liquidate those assets to pay the debts of the estate.

* * *

MR. BENDER: Well, I think Mr. Zack is correct by having the Court, if you please, order that those assets become part of the estate, subject to the fiduciary's responsibilities to liquidate and distribute those assets, number one.

* * *

THE COURT: . . . All you want done is – all you want done, unless you want to spend more money on attorneys, all you want done is for this Court – it's my understanding, all you want done is for me to say that property, given Judge Houk's ruling the Court of Appeals affirmance, is a piece of the estate and instruct the personal representative, what, to sell it and deposit the proceeds in a restricted account?

MR. BENDER: Correct, and pay the creditors, the rightful creditors of the estate and trust.

Indeed, this hearing resulted in the probate court issuing an order instructing the personal representative to take possession of the property, sell it, and pay the creditors consistent with the provisions of EPIC:

IT IS FURTHER ORDERED that the Personal Representative is instructed to inventory as Duane V. Baldwin Estate property the property that the Circuit Court declared is available for creditors; and

IT IS FINALLY ORDERED that the property the Circuit Court declared is available for creditors shall be sold and the proceeds distributed according to the laws governing deceased Estates.

In fact, defendants argue that we should use the above statement in the probate court proceeding as the basis for applying the doctrine of judicial estoppel to prevent plaintiff from maintaining a contradictory position now. See *Opland v Kiesgan*, 234 Mich App 352, 362; 594 NW2d 505 (1999). While it may well be that it would be appropriate to apply judicial estoppel to this case, we decline to determine whether, in fact, we should do so. Rather, it is sufficient to merely conclude that plaintiff's analysis of the situation in the probate court proceeding is the correct one—the property became part of the estate once the circuit court set aside the conveyances and the property is exempt from execution while it remains in the estate. Rather, as indicated by the probate judge in that proceeding, and later in his order, the burden is upon the personal representative to administer the estate, which presumably means selling the assets and using the proceeds to pay the claims against the estate consistent with EPIC.

Clearly what occurred here was not plaintiff having an epiphany of law, realizing that his collection efforts belonged in the circuit court rather than the probate court, but one of fact, with plaintiff realizing there was not going to be sufficient resources to satisfy not only his claim and those with a higher priority under EPIC. Therefore, plaintiff suddenly is looking to engage in collection in circuit court in an attempt to jump to the head of the line and receive first priority in having his claim paid. We will not support such blatant forum shopping.

Plaintiff does argue that we are obligated under the law of the case doctrine to uphold the trial court because of our statement in the prior appeal that “plaintiff may now execute against the property held by the entity defendants” *Shoaff, slip op* at 18. This argument, however, ignores two important points. First, it ignores the statement in the very next sentence of our earlier opinion that “such property shall be included in his [decedent’s] assets and is not exempt from liability for his debts.” *Id.* This statement reflects that the property became assets of the estate and, as discussed above, must therefore be administered by the estate under the provisions of EPIC. And this statement is as relevant to application of the law of the case doctrine as the previous sentence. But more fundamentally, plaintiff ignores the fact that the law of the case doctrine only applies to issues actually decided in the prior appeal. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). The issue whether plaintiff could directly execute on his judgment against the property in circuit court or had to present his claim to the personal representative in the administration of the estate was simply not an issue addressed in the prior appeal. Thus, the statement in the prior appeal does not represent a holding that must be respected under the law of the case doctrine. Rather, it is merely some unfortunately imprecise language merely meant to reflect that the issue whether the property properly belonged to the entity defendants or was available to satisfy the decedent’s debts is resolved and the property is now available to satisfy those debts. The statement did not establish how those debts were to be satisfied.

Plaintiff similarly attempts to attach such meaning to the statement in the 2002 circuit court judgment that the conveyances were “set aside for the benefit of Plaintiff to satisfy his Judgment against defendants” Plaintiff would have us read that language in the judgment to mean that plaintiff was granted first priority against the property, even to the extent of having been granted the status of a judgment lien. First, plaintiff offers no argument on how the circuit court would have such authority to alter the priorities established under EPIC. Second, we see no such command in the judgment. The judgment did not award the property to plaintiff, but simply set aside the conveyances to the entity defendants. Indeed, as this Court observed in *George v Sandor M. Gelman, PC*, 201 Mich App 474, 477; 506 NW2d 583 (1993), a judgment by itself does not establish a lien against property. The statement above, along with other statements in the judgment, merely reflects the reason for setting aside the conveyances—i.e., that the conveyances were improperly made to insulate the property from the decedent’s current and future creditors, that plaintiff was harmed by those fraudulent conveyances, and therefore the conveyances had to be set aside so that the properties were available to be used to satisfy plaintiff’s claims. The statement does not establish that plaintiff was somehow entitled to circumvent EPIC in doing so.¹

For the above reasons, we conclude that the trial court erred in allowing plaintiff to execute on the property to enforce its judgment in circuit court. The circuit court should have acknowledged that, consistent with the probate court’s order, the property was to be administered

¹ In fact, this ultimately brings us back to where our analysis started: that MCL 700.3812 restricts the execution under a judgment on estate property. MCL 600.6104(3) only allows the trial court to order satisfaction of the judgment out of property not exempt from execution.

by the personal representative on behalf of the estate consistent with EPIC and that plaintiff had to pursue its claim under the judgment against the estate in the probate court, recognizing the priorities and procedures set forth in EPIC. Accordingly, we set aside the circuit court orders of April 17, 2006, conveying the properties to plaintiff and direct that title to the properties be returned to the estate.

Next, plaintiff argues that the trial court erred in awarding the court officer \$18,000 in fees related to assisting in the execution of the judgment. In light of our conclusion on the first issue, we find this issue to be moot. Because there could be no execution on the properties, there can be no fee by the court officer to which defendants are obligated in this action to pay. Similarly, because defendants are not obligated to pay the court officer's fee, and it appears that any fee previously paid to the court officer was paid by plaintiff, defendants did not suffer any actual injury by any improper actions by the court officer to entitle defendants to treble damages under MCL 600.2559(6).

Finally, defendants argue that the trial court erred in its April 20, 2006, order awarding attorney fees and costs to plaintiff. Defendants, however, state in their brief that if we reverse the April 17 order transferring title and possession of the properties, then the issue of the award of attorney fees "may be considered withdrawn or moot." Accordingly, we will consider this issue withdrawn.

For the above reasons, we conclude that the trial court erred in transferring title and possession of the property to plaintiff. The effect of the circuit court judgment in this matter was to return ownership of the properties to the decedent and thus became assets of the estate. Plaintiff should have pursued his claim against the estate in the probate court. The order of the circuit court transferring title and possession to plaintiff, as well as the previous temporary restraining order, is vacated. Title and possession of the properties is returned to the estate to be administered by the personal representative in a manner consistent with EPIC. If plaintiff wishes to pursue his claim under the judgment, he shall do so in the probate proceedings in a manner consistent with EPIC.

Reversed. Defendants may tax costs.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ William B. Murphy